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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VERNON RIVERA ORTIZ, Defendant and Appellant.	B296617 (Los Angeles County Super. Ct. No. BA455679)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Veals, Judge. Affirmed.

Nancy J. King for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Michael C. Keller and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals his conviction for committing a lewd act on a child. He argues the trial court erred in admitting: (1) a redacted recording of a confession he made during a polygraph examination, (2) evidence of his prior sexual offense on the same victim, and (3) the then-six-year-old victim's statement to her parents that she and defendant were "playing sex." Defendant also argues the trial court erred by imposing fines and fees without first determining his ability to pay. We affirm the judgment on all grounds.

FACTS AND PROCEDURAL BACKGROUND

In 2016, when M was 17 years old, she reported to a psychiatric social worker that she had been molested by defendant (her maternal uncle) in 2005, when she was six years old. After a police investigation, defendant was charged with one count of committing a lewd act on a child. The following testimony was elicited at the July 2018 trial.[1]

1. M's Testimony About the 2005 Molestation

In 2005, six-year-old M lived with defendant, her eight-year-old brother, and her parents. On a Saturday morning in 2005, defendant entered the bedroom M shared with her brother. Defendant first looked at M's brother. M's brother appeared to be asleep because he was not making noise and did not react to defendant's entrance. Defendant looked at M and then closed the door. M felt fearful because defendant looked at M as if "he wanted [her]." M had seen defendant give her this look before when she was three years old in Guatemala. M turned away from defendant and onto her right side, facing the wall.

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[1] The trial court overruled defendant's objections to some of this evidence. We discuss the relevant objections and the court's rulings in the Discussion section of our opinion.

Defendant crawled into her bed and got underneath the covers behind M. Defendant was on his right side, with his head propped up on his right hand. Defendant rubbed his penis back and forth on M's buttocks and made thrusting movements. Defendant asked M if she liked it. M, scared and shaking, nodded yes. Defendant put his left hand on M's thighs. He rubbed her hip, her thigh, and the front of her thigh over her nightgown. Defendant again asked if M liked it. M turned around and smiled silently. M turned back around. Defendant continued to touch her thigh and rub his penis on her.

Four to five minutes after defendant got into M's bed, M's father walked into the bedroom. M recalled stepping over defendant and running to her father. M went to the kitchen, and when she returned to the room, defendant was crying and choking himself with the cord from a toy phone. His head was bloody.

2. Father's Testimony About Discovering Defendant in M's Bed in 2005

M's father testified that in 2005, defendant lived with him and his family, which consisted of his daughter (M), his son, and his wife (M's mother). Defendant, who was mother's brother, slept on the family's couch. On a Friday night in 2005, he and defendant had been drinking beer in his garage. It was late, around 1:00 or 2:00 a.m. when they came inside, and both men went to sleep on the living room couch. M's mother left for work at approximately 7:30 a.m., and M's father fell back to sleep for a few more hours. M's father got up before noon and went to check on M and her brother in their bedroom.

At this point in the chronology, father's testimony differed slightly from M's. The children's bedroom door was open, and when he stepped into the room, M's father saw M's brother was watching television. Through the hinge of the door, he could see

defendant laying behind M in M's bed with his left arm around her. At first, M's father thought they were both asleep, but then he saw defendant's hip moving back and forth against M. M's father immediately stepped into the room and said, "What's going on?" Defendant sat up, startled. M's father yelled, "What the hell are you doing?" Defendant responded that he was sleeping. Defendant began to cry and told M's father to hit him if he did not believe him. Defendant then started banging his own head against the edge of the door. Both children were on their beds and started to cry. M's father grabbed defendant by the collar, told him to get out of the house, and pushed him out of the room.

Later, M's father picked his wife up at work, and the two of them talked to M. M told the couple that she and defendant were "playing sex." M's parents told her not to ever allow anyone near her again. They did not call the police because they wanted to put the incident behind them. Defendant came back that night, drunk, and said he had no place to go. He stayed on the family's couch for a few more weeks and eventually moved into a front building on the same property. He continued to spend time with the family but was never again alone with M.

3. M's Testimony About Defendant's Earlier Sexual Contact

When M was three years old, she lived in Guatemala with her mother. M and her family spent most of their time in her grandmother's house. M stated that she was inappropriately touched by defendant, who was then a teenager. M could not recall how often the touching occurred.

M remembered one specific incident. Defendant hid behind a door while she played with dolls next to another family member in her grandmother's living room. Once she was left alone, defendant picked M up, sat M on the couch, and took his erect penis out of his pants. M was a foot away from him. Defendant

asked M to touch his penis. When she said no and started to walk away, defendant told her that he was not going to play with her anymore. Defendant then may have grabbed M's hand and tried to have her touch his penis. The entire incident lasted about three minutes. M did not remember if defendant exposed himself at any other time.

M did not tell anyone about this incident because she was afraid her family would separate. She and her family moved to the United States the next year.

4. Defendant's Confession

A police detective testified that in 2016 she observed an interview between defendant and another individual.[2] The jury listened to a redacted recording of the interview and was given a transcript. The detective identified defendant's and the interviewer's voices for the jury. After playing the recording, the court instructed the jury that only defendant's statements were evidence, not the interviewer's questions.

At the beginning, the interviewer stated his name and said "I'm going to be your examiner today." The interviewer confirmed with defendant that they were to discuss allegations that defendant touched M's "private parts" in 2005. "Private parts," according to the interviewer, meant "breasts, vagina, anus, anything like that." Defendant told the interviewer at the outset of their exchange that he was tired.

After defendant provided some personal background information, the interviewer asked defendant to describe what he remembered about the 2005 incident. Defendant replied that nothing happened and that he was tired of all the questions. In

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[2] The "other individual" was a polygraph examiner. We discuss defendant's objections to this line of questioning of the police detective and the admission of a transcript and the recording of the interview in Part 1 of the Discussion.

response to prodding and after the interviewer told defendant that it was his job "to determine what the truth is," defendant recalled that the incident occurred on a Saturday in 2005, but did not remember the month. That day, defendant had spent the afternoon after work with his brother-in-law and a coworker, playing poker in the garage. Defendant said he did not like to drink, but his brother-in-law, M's father, talked him into drinking some beers, and he became intoxicated because he was not used to drinking. Defendant got sick, and M's father took him upstairs and put him to bed in M's brother's bed.

Defendant did not remember anyone else being in the room when he went to bed, but he woke up later when M's father came in and yelled, saying that defendant was touching M. Defendant stated he was still in M's brother's bed, but M was in the bed with him, facing away from him. Nobody was in M's bed at the time.

M's father yelled at defendant. Defendant left the house and walked around until early the next morning. He spoke with his sister (M's mother) and told her nothing happened. He said M's mother believed him. Defendant said he would not have done anything like that because M was his family and "that's sick."

The interviewer then left the room for a period of time, and when he returned, defendant was sleeping. The interviewer asked, "Did you touch [M]'s private parts in 2005," and then, "In 2005, did you touch [M]'s private parts?" Defendant answered "no," to both questions, and told the examiner that his English was not "that good." The interviewer repeated the same two questions, to which defendant again responded, "no." The interviewer told defendant he was not being honest, and that he did touch M's private parts. The examiner told defendant that he didn't think defendant was a bad guy and that he just wanted defendant to clear up what happened.

Defendant insisted that he did not have any memory of touching M, and the examiner continued saying he was not being truthful. Eventually, the interviewer began describing what he thought happened: defendant's hands started roaming, one thing led to another, and defendant touched M's breast and vagina, to which defendant responded, "Mm-hmm," and, "that's what you think happened?" The interviewer said, "Well, that's exactly what I think happened." Eventually, defendant said he remembered touching M's hair, and "probably" touched her breast. He did not remember "rubbing" M's breast, and any touching occurred over her clothes. Finally, the interviewer asked defendant to again tell his story, and defendant described going to sleep in M's brother's bed after an evening of drinking, and then later waking up with M next to him. M grabbed his hand and defendant touched her hair but stopped touching her when he realized what he was doing. Then he woke up when M's father came in and yelled at him.

The interviewer left the room, and the detective came in. The detective asked defendant to confirm that the touching was over clothing, not under, and it was the breast and the hair. Defendant responded, "Mm-hmm," and "Yeah."

In her testimony, the detective said the recording that was played for the jury was the second interview of defendant that day. The first interview took one to two hours. She said defendant's statements in the first interview were consistent with his denials throughout most of the second interview. She said the second interview was likely about three hours long, and approximately two hours of it was redacted. The detective also stated defendant informed her his first language was Spanish, and he occasionally stumbled while speaking English.

5. Defense Testimony

Defendant elicited testimony from M's brother and an expert on memory retention.

M's brother, who was 21 years old at the time of the trial, testified that on the day in question he was awake when defendant entered the room he shared with his sister. It was hard for him to remember the incident. He did not think it was a big deal at the time. He did not look at defendant when he entered the room. He saw defendant lying in bed with M and then his father walked into the room a few minutes later.

Dr. Ronald Markman testified as an expert witness regarding memory retention. Dr. Markman was of the view that adults remember events better than children. It was not common for three-year-old children to have detailed memories. A six-year-old child's memory may be as reliable as an adult's memory. But all memories fade over time. Based on a hypothetical mirroring of the facts of this case, Dr. Markman believed that M's specific memories of the 2005 incident would be questionable, but that the general memories would not be. Dr. Markman observed that it was possible for children to confuse the identity of the person who commits a sexual act on them.

Dr. Markman also testified that a person might sleepwalk and move their body in relation to a sex dream. However, the more a person drinks the less likely a person is to move. He stated that people do not speak in full sentences in their sleep.

6. Conviction and Sentencing

The jury convicted defendant of committing a lewd act on a child (Pen. Code, § 288, subd. (a)). The court sentenced defendant to three years in prison. The court imposed a $300 restitution fine (Pen. Code, § 1202.4), a $40 court operations assessment (Pen. Code, § 1465.8), and a $30 court facilities assessment (Gov. Code, § 70373). Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues the court should not have admitted (1) the redacted recording of the confession he made during the polygraph examination, (2) M's testimony about defendant's 2003 sexual touching of M, and (3) then-six-year-old M's statement to her parents in 2005 that she and defendant were "playing sex." Defendant also argues the trial court erred in imposing fines and fees without first determining his ability to pay. We address each contention in turn.

1. The Trial Court Properly Admitted the Redacted Confession at the Polygraph Examination

Defendant contends that the trial court erred when it allowed the People to play a redacted recording of a confession he made during a polygraph examination. He argues (1) the interview was inadmissible under Evidence Code section 351.1; (2) his inability to cross-examine the interviewer who conducted the polygraph examination violated his Sixth Amendment rights; and (3) statements made by the interviewer were inadmissible.[3]

a. Relevant Proceedings

During pretrial motions, the parties discussed the introduction of a redacted transcript of a polygraph examination

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[3] Evidence Code section 351.1 provides:

"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and postconviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

"(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

where defendant confessed to inappropriately touching M. Defense counsel sought to exclude the entire polygraph transcript for two reasons. First, defense counsel argued that the redactions in the transcript were misleading and thus hampered her ability to effectively cross-examine the circumstances surrounding the interview. Second, defense counsel argued that the transcript included the opinions of the polygraph examiner throughout, and was inadmissible for that reason as well. Defense counsel pointed out that the interviewer suggested defendant was a liar based on his body language and exhorted defendant to tell the truth. Defense counsel acknowledged that these statements would be admissible if a detective said them, but argued that they were per se inadmissible because a polygraph examiner said them.

The court indicated that defense counsel could use the doctrine of completeness on cross-examination to point out any portions of the redacted transcript she believed were misleading. The court stated: "To the extent that the People might elicit and present a portion of the transcript that you feel is misleading because it doesn't communicate the whole picture, the doctrine of completeness is available to you. You can always point out other portions of the transcript that explain the circumstances. . . ."[4] The court agreed that opinions of polygraph examiners are inadmissible, but concluded the statements made by the

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All subsequent statutory references are to the Evidence Code.

[4] By "doctrine of completeness" we understand the trial court was referring to section 356, which provides, in part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ."

interviewer were not opinions prohibited by section 351.1. The court found the interviewer's statements coaxing defendant to be truthful and saying "I don't believe you" were not barred. The court reasoned that these statements were "integral" to understanding the interview. The court did not believe that jurors would consider these statements to be an opinion of a polygraph examiner as any mention of the polygraph would be censored. Instead, jurors would understand this as the interviewer's method of getting defendant to talk. The court offered to admonish the jurors regarding this evidence.

Defense counsel asked the court to reconsider its ruling. She argued that the transcript contained the phrase, "You failed this test, so I know it's 100 percent certain that you're not being 100 percent honest with us. Okay?" Defense counsel acknowledged that redacting "You failed the test, so" from the beginning of the sentence changed the phrase from an opinion to an accusation. Nevertheless, defense counsel persisted that the unredacted phrase was inadmissible because the original phrase was an inadmissible opinion. Redacting the reference to a polygraph test, he continued, did not make the statement admissible.

The court responded, "You know, I'm going to tell you, when I look at this, I just say to myself you got to give me a better example. What I see here is a very earnest attempt to present only that which will not make reference to the test, will not make reference to the circumstances under which he's being tested, that sort of thing. This witness at this point[,] he's saying that you're not being honest with me as any detective on [*sic*] would say to someone."

The court explained, "[Section] 351.1 talks about the exclusion of the results of a polygraph examination, the opinion of a polygraph examiner or any reference to an offer to take, failure

to take, or taking of a polygraph examination shall not be admitted into evidence. So we're talking in the context of a polygraph exam. . . . [¶] . . . So the opinion of a polygraph examiner, that person would say this person, the accused, took the exam, and it's my opinion that he is not truthful. He was not truthful in the statement that he made. Okay? But that's not what we have here. What we have here is a questioning that is, as far as the jurors are concerned, I understand they're saying it's the opinion but is not offered as an opinion. It's offered as part of this interrogation in order to get the defendant to come forward with truthful information. . . . It's the difference between, you know, hearsay and non-hearsay because the statements are offered, if not offered – see, this isn't offered as an opinion of the polygraph examiner."

The court continued, "[W]e have to look at this common sensically. . . . [F]rom my standpoint the statute is very clear in what is being excluded. It's information being presented to the jury that this guy took an exam or refused to take an exam, and I come to these conclusions because of the foregoing. [¶] But that's not what we're dealing with here. We're dealing with the situation in which he apparently took the exam, and we're not getting into that. We're not even telling the jurors that he completed an exam. But he did have a discussion with the polygraph examiner and you want to say as part of the exam. The People, I'm sure, would argue that it wasn't. But either way, it's not being offered as a conclusion of the polygraph examiner. It's just part of the process of interviewing the defendant." The court added: "I'll be happy to tell the jurors that what is appropriate for them to consider is the defendant's response and the questions or the comments that the questioner made are to be considered only as they afford meaning to the answer that follows them."

The court concluded, "Just to kind of summarize what I said before, in order for something to be deemed an opinion, it has to be offered as such, and it is specifically not being offered as such here. It's not the context of the examination that this is presented as evidence that he has admitted any particular crime. The jurors won't even know that an examination was done."

Defense counsel also moved to redact a portion of the transcript that mentioned statements made by the victim to other people under hearsay and section 352 grounds. The court denied that motion because the statements were not offered for the truth of the matter and were not more prejudicial than probative.

During trial, the prosecution played the redacted audio of defendant's interview to the jury. Afterwards, the court advised the jury, "Just a bit of information with respect to what you heard, ladies and gentlemen. Do keep in mind that the actual evidence is the statements, the answers, supplied by . . . the defendant in this case. The questions are not evidence, and you consider them only to the extent that they supply meaning to the answer that is given in response to it." The court also admonished the jury not to speculate as to why the transcript had been redacted.

At the end of trial, the court repeated its earlier instruction on how to consider defendant's statements and admonished the jury to view defendant's admission with caution (CALCRIM 358). The court also warned the jury that defendant could not be convicted without some proof of each element independent of any admission (CALCRIM 359).

b. The Trial Court Did Not Abuse its Discretion in Admitting Defendant's Confession

Section 351.1, subdivision (a) provides: "the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a

polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." Subdivision (b) clarifies, "Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible." (§ 351.1.) We review a trial court's ruling on the admissibility of polygraph-related evidence for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120.)

Defendant does not argue that the redacted recording contained the results of his polygraph exam or refers to him taking a polygraph exam. Rather, defendant asserts that the "implication" of the redacted interview was that it was not an ordinary police interview, but rather a polygraph examination. Defendant selectively quotes portions of the interview to argue that the jury must have inferred he took a polygraph examination.

None of the quoted portions mention a polygraph examination. When they are considered in the context of how the recording was presented to the jury, the excerpts do not indicate defendant was subjected to a polygraph test.[5] The redacted interview did not mention anything about a polygraph exam, or

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[5] Defendant argues that police accusations that he was lying or "not being 100% honest with us" was the equivalent of telling defendant (and therefore the jury) that he "flunked" the polygraph test. We do not accept defendant's inference. "The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. '[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof.' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.) The police calling a suspect a liar is not tantamount to saying the suspect failed a polygraph examination.

any content prohibited under section 351.1. A detective testified that defendant had several interviews that day, and that the redacted recording was one of them. Both parties referred to the interviewer as a police officer or the interviewer.

The interviewer's repetition of questions and the statement defendant was not telling the truth did not reveal that the recordings were part of a polygraph examination. Repeating questions is not unique to polygraph examinations. (See *Miranda v. Arizona* (1966) 384 U.S. 436, 451 [modern police interrogation tactics involved dogged persistence].) Neither is the interviewer's insistence on defendant's guilt. (See *Id.* at p. 450 [modern police interrogation tactics involve the police officer's confidence in the suspect's guilt, to the point that his guilt is posited as a fact during the interrogation].) Likewise, the interviewer's act of leaving the room and the statement that he was there "to determine what the truth is" does not support an inference that defendant took a polygraph examination. Such tactics are commonly employed in ordinary police interrogations. (See *id.* at pp. 450-451.)

The court did not abuse its discretion in finding that no reasonable jury would have inferred defendant took a polygraph examination. (See *People v. Westerfield* (2019) 6 Cal.5th 632, 700-703 ["[n]o inadmissible evidence had been admitted" when the prosecution "introduced a version of the taped interview that had been redacted to eliminate all references to the polygraph examination"].)

c. No Violation of Defendant's Sixth Amendment Rights

Defendant argues that his rights to confrontation and compulsory process were violated because he was not able to cross-examine the interviewer. He argues he "was placed in an impermissible Catch-22, with no possible way to explain the

circumstances or cross-examine the polygrapher, as is his constitutional right, without waiving his statutory right."

"Under the Sixth Amendment to the United States Constitution, a defendant in a criminal trial has the right to confront and cross-examine adverse witnesses (the Confrontation Clause). This provision bars the admission at trial of a testimonial statement made outside of court against a defendant unless the maker of the statement is unavailable at trial and the defendant had a prior opportunity to cross-examine that person." (*People v. Barba* (2013) 215 Cal.App.4th 712, 720.)

Here, the interviewer's statements were neither testimonial, nor were they evidence. The court specifically advised the jury about the recording: "Just a bit of information with respect to what you heard, ladies and gentlemen. Do keep in mind that the actual evidence is the statements, the answers, supplied by in this case the defendant in this case. The questions are not evidence, and you consider them only to the extent that they supply meaning to the answer that is given in response to it." We presume the jury followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 453.) Defendant's right of confrontation was never in jeopardy.

We also observe that defendant did introduce evidence regarding the circumstances of the interview. The jury learned that (1) defendant had various interviews that day, (2) the interview where he confessed lasted three hours, (3) defendant was tired during the interview and even fell asleep when the interviewer was away for 40 minutes, and (4) defendant said he felt "a lot of pressure" during the interview. The interview transcript showed that defendant had some difficulty understanding English. Finally, defendant does not specify what, if any, evidence he would have elicited from the interviewer that

was otherwise unavailable. (See *People v. Westerfield, supra,* 6 Cal.5th at pp. 700-703.)

d. Statements by the Interviewer Were Not Hearsay

Defendant argues the interviewer "made statements of fact, not opinion – 'we know that you did touch [M]'s private parts' – that were irrelevant, inflammatory and inadmissible hearsay." He asserts the "admission of those statements violated [his] federal constitutional rights to due process, a fair trial and a reliable verdict based on admissible evidence."

As discussed in the preceding section, the court instructed the jury that the interviewer's statements were not evidence and could only be used by the jury to give context to defendant's answers. The statements were not hearsay nor did they otherwise violate defendant's rights.

2. *The Trial Court Properly Admitted Defendant's 2003 Sexual Assault on M*

Defendant argues the court erred in admitting M's testimony about defendant's 2003 uncharged sexual offense against her when she was three years old. He contends section 1108, which allows for admission of evidence of defendant's other sex crimes in sex offense cases for the purpose of showing a propensity to commit such crimes, is unconstitutional. Alternatively, defendant argues that the trial court erred under section 352 by admitting the prior uncharged sexual offense.

a. Relevant Proceedings

During pretrial motions, defendant moved under section 352 to exclude testimony regarding his prior conduct with M in Guatemala. The People argued that the prior offense was relevant to defendant's intent and M's credibility. The court agreed the prior offense was relevant, but was concerned about whether M had the ability to reliably remember events that occurred when she was three years old. After hearing M's

testimony about the prior offense outside of the presence of the jury, the court held that she met the threshold for reliability. Defendant again moved to exclude the evidence under section 352. The court denied the motion and admitted the evidence. Before the jury, M testified as we have described in the Facts and Procedural Background section.

b. Section 1108 is Constitutional

Section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

As defendant acknowledges, the California Supreme Court rejected the argument that section 1108 is unconstitutional in *People v. Falsetta* (1999) 21 Cal.4th 903, 907 (*Falsetta*). Our Supreme Court has "repeatedly declined" to reconsider *Falsetta.* (See *People v. Molano* (2019) 7 Cal.5th 620, 664 (*Molano*), citing *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 827, *People v. Loy* (2011) 52 Cal.4th 46, 60- 61; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289.) Defendant nonetheless urges this Court to reconsider that holding. We do not have the power to do so. "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

c. No Abuse of Discretion in Admitting the Evidence Under Section 352

Defendant next contends the court abused its discretion under section 352 in admitting the evidence of the prior sexual assault. "Under section 352, exclusion of evidence is permissible only if its probative value is 'substantially outweighed' by the 'probability' that its admission will create a 'substantial' danger

of 'undue' prejudice." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.) The trial court balances the probative value of the evidence against four factors: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*Id.* at p. 282.) "As with other forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission." (*People v. Loy, supra,* 52 Cal.4th at p. 62.) "The trial court's ruling admitting evidence under these provisions is reviewed for an abuse of discretion." (*People v. Erskine* (2019) 7 Cal.5th 279, 296.)

The Guatemala offense was highly probative of defendant's intent for the charged molestation and to refute defendant's theory that he was unconscious or asleep during it. The testimony supported the People's case that this was an intentional sexual assault—not just the alcohol-fueled sleepwalking incident postulated by the defense. The evidence showed defendant had a common scheme or plan in both incidents to sexually assault M when she was isolated from adults. (*People v. Branch, supra,* 91 Cal.App.4th at p. 283 [earlier incident of sexual abuse probative that later incident was not accidental and showed common scheme or plan].)

Defendant argues on appeal that the prior offense was not relevant because M "barely" remembered it. On the contrary, the trial court found that M remembered the incident and met the threshold for reliability. At most, M's age and her ability to remember would go to the weight of her testimony.

We also conclude the court did not abuse its discretion in admitting the Guatemala incident in the face of defendant's accusation of undue prejudice.

First, the prior offense was not more inflammatory; on the contrary, in the charged offense, defendant succeeded in touching M with his penis for several minutes. M was not certain there was touching during the Guatemala incident. Defendant also claims that the prior offense was more inflammatory because the victim was younger. The argument borders on the fatuous. We will not debate whether sexual molestation of a six-year-old is less or more detrimental than sexual molestation of a three-year-old.

Second, there was little risk that the jury confused the charged and uncharged conduct. Testimony from M and her father distinguished the two incidents in time and place. The court gave the jury a limiting instruction regarding M's testimony about the Guatemala offense. The court stated in part: "even though you find by a preponderance of the evidence that the defendant committed an uncharged sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crime charged in count one. If you determine an inference properly can be drawn from this evidence, you must consider that inference as simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the crime charged in count one." The court emphasized: "You must not consider this evidence for any other purpose."

Where the "jury was given an effective instruction by the trial court to consider the evidence only for proper limited purposes, . . . we must presume the jury adhered to the admonitions." (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1277.)

Third, the prior conduct was not remote – the two incidents were approximately three years apart. (See *Hollie, supra,* 180 Cal.App.4th at p. 1276 [a two-year gap between offenses is

not remote].) Defendant argues that "the passage of time and described circumstances placed an impossible burden on [defendant] to defend against the accusation." We are not convinced the timing of the 2003 Guatemala assault created any more obstacles for defendant than did the 2005 charged offense. We observe that defendant cross-examined M about her memory of the prior offense, and called an expert witness to cast doubt on her ability to remember the prior conduct. Such defense strategies show that the prior offense was not "impossible" to address.

Fourth, the similarity of the offenses makes the uncharged act particularly probative even with a three-year gap between them. Both offenses involved defendant cornering M while separated from her nearby family with the intent to touch her with his penis. (See *People v. Branch, supra,* 91 Cal.App.4th 274 ["substantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses"].)

Finally, defendant contends the court did not actually engage in the required section 352 balancing before it admitted the Guatemala incident. We disagree for two reasons. First, the trial court need not state on the record all the factors considered in weighing probative value and prejudice. The record must only disclose that the court did engage in the balancing process. (*People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *People v. Mickey* (1991) 54 Cal.3d 612, 656 ["the trial judge need not expressly weigh prejudice against probative value—or even expressly state that he has done so"].) Second, it is clear from the transcript that the trial court did balance the various probative and prejudicial factors, including the inflammatory nature of the Guatemala offense and the reliability of M's memory of events that took place when she was three years old.

In arguing that the Guatemala offense should be excluded, defendant relies on *People v. Harris* (1998) 60 Cal.App.4th 727. He states, "The *Harris* court reversed convictions for sexual crimes resulting in a 47-year sentence because the trial court improperly admitted evidence of prior sexual acts that were remote, inflammatory, nearly irrelevant and likely to confuse and distract the jury." The defendant in *Harris* was a mental health nurse accused of sexual assaults with two patients in 1995 (one victim had previously engaged in consensual sex with Harris, and the other was incapacitated when he fondled her). (*Harris,* at pp. 727, 730-732.) Harris's prior conviction was for a bloody and violent physical sexual attack on a stranger. (*Id.* at p. 733.) *Harris* does not assist defendant. The prior sexual attack was highly inflammatory, involved a different victim and bore no factual relationship with the charges in his trial. In defendant's case, the charged offenses were against the same victim, involved a similar modus operandi and presented similar factual patterns.

3. The Trial Court Did Not Abuse its Discretion in Admitting M's 2005 Statement to Her Parents

M's father testified that hours after the 2005 incident (around 5 or 6 p.m.), he picked up his wife from work and the couple talked to M about the incident, asking her what happened. When the People asked M's father what did M say, defense counsel objected on hearsay grounds. The prosecutor argued that it was admissible as a fresh complaint. The court ruled it was admissible as either a fresh complaint or a prior consistent statement. M's father testified that M told them that she and defendant had been "playing sex."

On appeal, defendant contends the trial court erred when it allowed M's father to testify to M's statement. Defendant renews his argument that the statement was hearsay and asserts it was not offered for the limited purpose of showing a fresh complaint.

The proof of the latter, defendant contends, is found in the trial court's failure to give the jury a limiting instruction.

We conclude that M's statement was properly admitted as a fresh complaint. Under the fresh complaint doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." (*People v. Brown* (1994) 8 Cal.4th 746, 749-750.)

The father's testimony that M said she and defendant were "playing sex" fell within the fresh complaint doctrine. The People did not offer the statement for the truth of the matter asserted—that M was actually "playing sex" with her uncle—but rather to show that (1) M reported defendant's sexual act to her parents on the day that it occurred; and (2) the story was not made up many years after the fact at the trial. That M briefly referred to what had happened did not render the fresh complaint inadmissible. "[E]vidence of the fact of, and the circumstances surrounding, an alleged victim's disclosure of the offense may be admitted in a criminal trial for nonhearsay purposes under generally applicable evidentiary principles, provided the evidence meets the ordinary standard of relevance. (Evid. Code, § 210.)" (*People v. Brown*, *supra,* 8 Cal.4th at p. 763.)

Defendant is incorrect in his assertion that the trial court had a sua sponte duty to provide a limiting instruction. (Defendant did not request one.) "On request, the trial court must instruct the jury as to the limited purpose for which the fresh complaint evidence was admitted. [Citation.] However, the trial court has no duty to give such an instruction in the absence

of a request. [Citation.] Defendant did not request such an instruction at trial, and accordingly, the trial court had no duty to give a limiting instruction." (*People v. Manning* (2008) 165 Cal.App.4th 870, 880.)[6]

4. Defendant Forfeited His Dueñas Challenge

On January 8, 2019, Division Seven of this court held in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Id.* at p. 1164.) It also held that the execution of a restitution fine must be stayed "unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

Here, defendant contends that because there was no ability to pay hearing and no evidence in the record of his ability to pay, his $300 restitution fine must be stayed and the $70 in assessments vacated. But defendant did not request an ability-to-pay hearing before the trial court at his February 6, 2019 sentencing hearing. That hearing postdated *Dueñas* by a month. *Duenas* garnered considerable attention and there is no reason why an objection could not have been raised at sentencing. As the *Dueñas* court made clear in its subsequent opinion in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489-490, *Dueñas* does not apply in the absence of a record of the defendant's inability to pay.

Defendant cites *People v. Vera* (1997) 15 Cal.4th 269, for the proposition that "[a] defendant is not precluded from raising

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[6] Because we conclude M's statement was admissible as a fresh complaint, we do not address respondent's separate argument that it was admissible as a prior consistent statement.

for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*Id.* at p. 276.) But that statement in *Vera* is dicta. It " 'was not intended to provide defendants with an "end run" around the forfeiture rule,' but was limited to a narrow class of constitutional rights, none of which are involved here." (*People v. Linton* (2013) 56 Cal.4th 1146, 1166.)

Defendant also argues that if he forfeited his *Duenas* challenge, his trial counsel was ineffective for failing to raise the issue. To show that counsel was constitutionally ineffective, defendant must establish both that counsel's performance was deficient and that he suffered prejudice as a result of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

The record does not disclose why defense counsel failed to object to the restitution fine or the assessments or request a hearing on defendant's ability to pay those amounts. We cannot say there could be no satisfactory explanation for defense counsel's inaction regarding the assessments. Nor has defendant met his burden to show prejudice resulting from counsel's failure. Nothing in the record suggests that defendant is unable to pay the $300 restitution fine and $70 in assessments out of prison wages or otherwise. (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076.)

DISPOSITION

The judgment is affirmed.

RUBIN, P.J.

WE CONCUR:

MOOR, J. KIM, J.